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1995

Utah Department of Transportation v. Joseph Val Roberts and Verle H. Roberts : Petition for Rehearing

Utah Court of Appeals

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Stephen C. Ward; Assistant Attorney General; Attorney for Appellee;
J. Val Roberts; Attorney at Law; Attorney for Appellants.

Recommended Citation

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IN THE UTAH COURT OF APPEALS

UTAH DEPARTMENT OF TRANSPORTATION,	:	PETITION FOR REHEARING
Plaintiff and Appellee,	:	
vs.	:	
JOSEPH VAL RAY ROBERTS and VERLE H. ROBERTS,	:	950305 Case No. ~~950136~~-CA Priority #15
Defendants and Appellants.	:	

An Appeal from Second District Court
of Davis County
The Honorable Rodney S. Page, Judge

UTAH COURT OF APPEALS
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FILED
OCT 27 1995
COURT OF APPEALS

IN THE UTAH COURT OF APPEALS

UTAH DEPARTMENT OF TRANSPORTATION, Plaintiff and Appellee, vs. JOSEPH VAL RAY ROBERTS and VERLE H. ROBERTS, Defendants and Appellants.	:	PETITION FOR REHEARING Case No. 950136-CA Priority #15

An Appeal from Second District Court
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TABLE OF CONTENTS

Authorities Cited

TRIAL AND HEARING RECORDS Page

IN THE UTAH COURT OF APPEALS

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JURISDICTIONAL STATEMENT

The Utah Court of Appeals has jurisdiction of this case from the exercise of its pour-over authority by the Utah Supreme Court.

STATEMENT OF THE ISSUES ON APPEAL

1. Did the Trial Court exceed its authority under the cost to cure doctrine when it fashioned an equitable remedy in this condemnation case which gives the Appellee the permanent use of THREE (3) additional feet of Appellants' fee simple not contained in the complaint and not addressed in the stipulation of the parties for which no compensation was awarded when no severance damages could be adduced by the experts who were not excluded from testifying by the Court's rulings? (Standard clearly erroneous.)

2. Was it within the sound discretion of the Trial Court to award the Appellee the use in perpetuity of a portion of the Appellants' land not sought as an alternative to construction of safety rail atop their retaining wall because the Appellants sought this remedy in the Lower Court, or must such discretion exist independent of Appellants' desire to protect elementary age children from the attractive nuisance constructed by the Appellee? (Standard without regard to Trial Court.)

3. Was the choice of the Trial Court in fashioning an equitable remedy in a condemnation law case an ongoing violation of the Appellants' constitutional rights under Article I, Section 7, and Article 1, Section 22 of the Utah Constitution and the Fifth Amendment of the Federal Constitution? (Without regard to Trial.)

4. Did the Trial Court and the Court of Appeals' decision misapply the case law and the statute in determining that the Appellants did not preserve the issue of the right to take Appellants' property where the existing right of way contained more than the necessary land but would have been excessively costly to utilize? (Without regard to prior decision.)

5. Does Section 27-14-5(a) and the administrative regulations of the Appellee, when taken together, limit the Appellee's authority to take Appellants' property under 27-12-96(9) UCA 1953 as amended 1991? (Without regard to prior decision.)

6. What is the measure of damages under the facts of the case at bar where Appellee has taken Appellants' land solely to save the cost of returning the pavement strip and other improvements to standard locations within the preexisting three-rod road? (Standard clearly erroneous.)

7. Did the Trial Court exceed its discretion based on either individual errors or upon the cumulative errors in its rulings and order. (State of Utah v. David Franklin Young, 853 P2d 327 at 367-368. (Standard clearly erroneous.)

8. Should the Trial Court have dismissed the Appellee's Order of Immediate Occupancy for cited violation of judicial standards? (Standard clearly erroneous.)

The determinative constitutional provisions, statutes, and ordinances are: Utah State Constitution, Article I, Section 7 and Article I, Section 22; the Fifth Amendment of the United States Constitution; 78-34-9 Uct 1953 as amended 1967; 27-12-96(9) UCA 1953 as amended 1991; 27-14-5(a) UCA 1953 as amended 1975; 78-34-11 UCA 1953, unchanged; Cornish Town v. Koller 817 P2d 305 Utah 1991 at page 307.

STATEMENT OF THE CASE

The case is a first impression condemnation of easement for placement of sidewalk on a State road right of way with a precondemnation with a useable right of way totaling 66.5 feet, the same being in excess of the standard width needed in such cases for placement of all improvements relating to public safety. Placement of sidewalk on the Appellants' side of the right of way has been known by Appellee to be expensive due to a misplaced pavement strip since 1975. (See Sopko letter.)

Appellee initiated condemnation by complaint and supporting resolution with map on June 5, 1992.

The parties entered into a stipulation based on the complaint and amended complaint together with the appended map on September 11, 1992. Appellants have,

at all times, refused to withdraw any funds paid in by Appellee in order to pr issue of public necessity of the condemnation.

DISPOSITION IN THE LOWER COURT

The Trial Court entered an Order of Immediate Occupancy based sole stipulation without allowing any evidentiary hearing as to the public necessi condemnation.

At a bench trial on just compensation which the Court limited to the valu stipulated taking, the Court entered an order expanding the taking by gra permanent easement to THREE (3) additional feet of land within the ten easement, and entered a final order providing for compensation only for the SE\ feet mentioned in the stipulation.

The Appellants appealed, and the case was assigned to the Utah Court of A by the Utah Supreme Court under the pour-over provisions of its rules.

On October 12, 1995, the Utah Court of Appeals entered its order sustaini order of the Lower Court using its law and motion calendar to decide the motion Appellants for partial summary judgment and the motion of Appellee for sur judgment. Whereupon, Appellants lodged a Motion for Reconsideration on Octob 1995, and filed the Petition for Reconsideration on October 27, 1995.

RELEVANT FACTS

1. There has never been a hearing on the necessity of the taking of a perpetual easement for placement of sidewalk or the placement of a three-foot high supporting berm outside the limits of the stipulated total of SEVEN (7) feet because the Lower Court and the Appellate Court both misapplied the controlling statute and applicable case law. (TR Dec. 1, 1994, pg. 5, ln. 20-25. Also pg. 189, ln. 2-7.)

2. The precondemnation right of way was 66.5 feet wide prior to the taking, and arose as a remainder interest more than two decades prior to Utah Statehood. The right of way was added to by donation in 1922 going from 50 feet to 66.5 feet wide when the Utah Interurban street car tracks were laid down its center. After the tracks were removed, the relocation of the new pavement strip left only 25 feet of right of way west of the center line of the now off center pavement strip. The Appellee has known that the precondemnation right of way contained sufficient useable land upon which sidewalk could be placed only if all improvements were shifted back to the east side of the right of way by some EIGHT (8) feet since the letter of their engineers to Centerville Mayor Stanley Green dated October 24, 1975. (TR Sopko Exhibit.)

3. Appellee filed a fraudulent condemnation complaint claiming that it owned 33 feet of land west of the center line of the pavement strip on June 2, 1992. There was no appraised value paid in for the land sought by the condemnation resolution. The $900 was for shrubs, improvements, and temporary easement. At time of filing, Appellee had the 1935 State Road Commission survey and the 1953 UDOT survey

illustrating the right of way as a remainder interest of 66.5 feet in width which was defined on both sides by private property. (TR Dec. 1, 1994, pg. 208, ln. 4-20.)

4. The Trial Court limited the Appellants to presentation of just compensation only for the stipulated taking of property, then fashioned an equitable remedy to correct violations of Appellee's safety standards created by the construction of a retaining wall. On the basis of his personal training as an engineer, the Lower Court Judge awarded the Appellee the permanent right to construct a 3' x 3' berm west of the stipulated take to overcome violations of Appellee's own safety regulations without compensation to Appellants. (TR Dec. 2, 1994, pg. 75, ln. 25-pg. 76, ln. 8.)

5. Numerous violations of judicial standards by Appellee denied the Appellants due process of law. The Trial Judge held such of these violations as Appellants could bring to the record as immaterial; and as a consequence, the Appellants were denied due process of law. (TR, Motion Hearing, Nov. 17, 1992, pg. 1, ln. 18-pg. 3, ln. 9 and TR, Motion Hearing, May 15, 1994, pg. 6, ln. 9-pg.8, ln. 14.)

6. The Appellate Court misinterpreted the statutory and case law standards which permit trial courts to limit condemnation hearings to the sole question of just compensation, and rendered a memorandum decision not for publication adverse to the Appellants. (Redev. Agcy. of Salt Lake City v. Tanner, 740 P2d 1296 Ut. 1987 at pg. 1299-1300. Also Cornish Town v. Koller, 817 P2d 305 at 307.)

SUMMARY OF ARGUMENT

1. The Appellants argue that both the Trial Court's and the Utah Court of Appeals' holding that the Appellee can use one of the incorporeal hereditaments of their fee simple in perpetuity when no severance damages are shown in connection with such use takes one of the bundles of rights associated with ownership of land in fee simple without compensation. Appellants contend that their incidents of ownership of land which have no market value cannot be abridged as in the Lower Court order simply because severance damages to the remainder were not shown.

2. Trial Court jurisdiction to craft either a legal or equitable remedy is limited to equitable principles and must be based on law in the case at bar. The request of Appellants for a safety rail at the top of the wall cannot confer jurisdiction of the Trial Court to bend even a blade of grass on Appellants land even if the Court's discretion is as broad as all of the pasture land in the State of Utah. The Utah Court of Appeals' decision misapplies law and equity, and violates the taking provisions of both the Utah Constitution and the Federal Fifth Amendment. The judicial standard of a full hearing on authority to condemn found in Town of Cornish v. Koller was not provided in the case at bar.

3. The order of the Trial Court and the Utah Court of Appeals' ruling fails to recognize the difference between the use of the connective conjunction "and" and the disjunctive conjunction "or" in ruling that the signing of a stipulation without the additional withdrawal of funds required by the 78-34-9 UCA 1953 as amended 1967

violates the two-pronged requirement of Redevelopment Agency v. Tanner where Appellants have neither withdrawn any funds nor agreed to such withdrawal but have, in fact, recognized their peril and specifically refused to be entrapped by either Appellee's counsel or the Trial Judge into such withdrawal.

4. Given the statutory funding scheme of the Sidewalk Safety Act and Appellee's implementing regulations which specifically forbid the use of sidewalk safety grant money for the purchase of right of way precludes the use of eminent domain for sidewalk placement fund in 27-12-96(9) UCA is limited to purchases made from non-State funds or to gifts from public spirited entities or citizens.

5. Appellee, having exceeded its authority in taking Appellants' land solely for the purpose of avoiding the expense of relocating the existing improvements, i.e., pavement, curb and gutter and park strip, to the same position as such improvements occupy on other rights of way, must compensate Appellants for the entire value of the fee simple or $77,900 testified to by its expert plus the attorney's fees and costs of defending against the action.

6. The Trial Court should have vacated the order of occupancy based on fraud in the inducement, set aside the stipulation for fraud, and dismissed the Appellants' pleadings for either individual or cumulative violations of the judicial process both on and off the record.

DETAILS OF ARGUMENT

In Alamo Land & Cattle Co., Inc. v. State of Arizona 424 US 295, 47 L Ed 2d, 96 S Ct 910 Feb 24, 1976, Arizona argued that the holder of a grazing lease could not share in federal condemnation proceeds because the State Enabling Act did not permit the granting of a compensable property right to a lessee. The Ninth Circuit Court of Appeals agreed that lessee's interest could have no value. The United States Supreme Court, by a six to three decision, reversed holding that nothing in the law or facts prevented the usual application of Fifth Amendment protection to an outstanding lease hold interest but limited just compensation to the value of the unexpired lease hold interest without regard to possible future renewals. So, too, in the case at bar, Appellants have a constitutionally protected right to enjoy, without limitation, the remainder of their fee simple holding whether or not a burden placed on THREE (3) feet of such remainder has *a marketable value, the loss of which produces determinable severance damages.*

The Trial Court should have either required Appellee to provide for public safety by following its own rules without placing an additional burden on Appellants' remainder interest or, if it lacked the authority to impose the burden of the construction of a safety rail on Appellee, it should have left the probable future consequences solely to future judicial determination based on Appellee's obvious design negligence. No authority can be adduced which permits enlargement of judicial discretion based on the assertions that Appellants' request for safety rail assumes that the Court had the authority for its choice of remedy. Such authority does not arise from anything other

than an applicable statute or case law which must be on all fours with the facts of the case at bar. No such authority is cited by the Appellate Court because none exists.

The Appellate opinion cites two cases and a statute for the proposition that Appellants failed to preserve the issue of Appellee's authority to condemn Appellants' property for the placement of sidewalk. The Court has misapplied both cases and has failed to recognize the intent of the Legislature in limiting the statute to fact situations where interested third parties pay for any land acquired by the application of 27-12-96(9).

In Cornish Town v. Koller, Defendants were allowed a three-day evidentiary bench hearing to challenge the Plaintiff's right to condemn their land to protect the town culinary water supply. The Supreme Court ruled that the Trial Judge was within his discretion to deny Defendant's the chance to re-try the authority to condemn question to a jury because the question had already been determined upon evidentiary hearing and was a question of law. The citation of the case for the proposition that Defendants waived their right to contest the authority of Cornish Town to condemn is grossly in error. Koller had a three-day evidentiary hearing on the question of Cornish Town's authority to condemn. Appellants in the case at bar are to be distinguished from the Koller case never having been afforded any hearing on their assertion that because Appellee stipulated to a taking where no authority to condemn existed, the Appellants' measure of damages is not limited to the just compensation for the portion occupied by the sidewalk and retaining wall but to the entire value of the total fee simple as appraised by Appellee's expert DEAN HOLBROOK.

The opinion next cites Redevelopment Agency v. Tanner for the proposition that the Lower Court could rely solely on the stipulation to make the determination and finding of public purpose and need for the portion of Appellants' property. Once again, the case law is misapplied by the Court. According to the square holding in Tanner, the language of the cases cited in the opinion requires that TWO (2) conditions be met before the Lower Court can limit the hearing to just compensation. The two conditions are joined by the connective conjunction "and." The first requirement is that there be a stipulation which does not expressly reserve the issue of authority to condemn. The second requirement is that the money paid into the court be withdrawn. Both requirements must be met in order for the Lower Court to limit the issue at trial to one of just compensation. If both non-reservation and funds withdrawal were not required by the cases, the proper conjunction would be "or" and the case would then read failure to use specific language reserving the issue of authority to condemn "or" withdrawal of the funds waives the private property owner's right to contest the condemning authority of the Salt Lake Redevelopment Authority, or as in Friberg, 687 P2d, 821, 840 (Utah 1984), the right of UDOT to condemn the property at issue. Given the use of the connective conjunction "and" in both the authorities cited, it cannot be seriously contended that only failure to reserve is required in the case at bar, and the authorities cited do not apply where Appellants not only did not and have not withdrawn any funds that the issue of authority to condemn was properly excluded by the Lower Court.

The argument made in UDOT v. Friberg (supra) as cited in the Redevelopment Agency v. Tanner opinion at pg. 1300, 1301, that to allow Appellants to contest UDOT'S

authority to condemn, "***would be to sanction the abuse of settlement proceedings by allowing parties (once they determine that additional money is available) to invalidate stipulations by simply claiming that the issues they stipulated to can forever be raised, indeed departing from the rule in Section 78-34-9 invites controversy in every condemnation case and affords a means for parties to manipulate the measure of the compensation, which the statutory provision attempts to prevent." The United States Supreme Court case which limited the parties' ability to manipulate settlement proceedings by fixing the maximum amount of just compensation where the property owner does not give up all of the incorporeal hereditaments of his fee simple to the greatest public good, but is restricted in the use of his fee. The limit of recovery is the fair value of the total fee simple. (See Lucas v. South Carolina, Coastal Council 120 LE2d 798, 112 S. Ct. 2886.)

In the case at bar, Appellee holds a remainder interest right of way and had a total width of ONE-HALF (1/2) foot greater than the 66 feet necessary for the placement of centered pavement, curb, gutter, and sidewalk on both sides of State Road 106. (Trial Record, redirect examination of Robert Jones, pg. 45, line 17 thru pg. 47, line 5, and Motion.)

Section 27-12-96(9) grant of authority to condemn private property for placement of sidewalk is limited by Section 27-14-5(a) and the Appellee's implementing regulations which forbid the expenditure of any sidewalk safety grant money by either Appellee or participating cities and counties for the acquisition of additional rights of way. Sidewalk safety grant money can only be used where there is existing useable right of way

adjacent to State roads or where right of way is donated by the participating government entity or by donation from private citizens. The letter of October 1975 from Appellee's representative ANDREW SOPKO to Centerville Mayor STANLEY GREEN saying that on the west side of SR-106, Appellee does not have sufficient width as measured from the center line of the pavement strip to the curb to permit the placement of sidewalk was written to explain that while there is more than the required 66 feet overall, it would be necessary to relocate the existing pavement, east sidewalk, and both curbs and gutters at an estimated cost of ONE MILLION DOLLARS (in 1975) in order to have both sides of the right of way in useable condition. The Lower Court admitted the letter but excluded the explanation; and by so doing, denied Appellants' right to use the total value of their fee simple as the measure of just compensation.

Two basis for granting Appellants the removal of the offending three-foot wide and three-foot high berm and directing the Trial Court to enter a judgment for the full value of the entire fee simple together with the entire costs of the Lower Court proceedings may be addressed together.

Among the cumulative errors of the Lower Court, one of the most blatant of which is the denial of the Appellants' right to a hearing on the issue of Appellee's authority to condemn. The record reflects that the Court clearly understood the Appellants' reservation for evidentiary hearing the question of Appellee's authority to condemn. (See November 17, 1992, Trial Transcript, Motion Hearing, page 1, line 18 thru page 3, line 9 read together with Motion Hearing Transcript, May 15, 1994, at page 6, line 9 thru page 8, line 14.),

The second is the on and off record acts of Appellee which prevented an accurate hearing on the merits beginning with the filing of a fraudulent complaint supported by both a deliberately erroneous condemnation resolution and a map which concealed the true intent of Appellee to use THREE (3) feet more of Appellants' land than they bargained for in the stipulation. (See map attached to complaint. See construction map showing three-foot berm. See October 1975 letter, Andrew Sopko, which was also an Appellants' exhibit at trial. See Trial Record, December 1, 1994, page 203, line 18 thru line 25 and page 207, line 17 thru page 209, line 6.)

RELIEF SOUGHT ON APPEAL

1. Reversal of the unpublished opinion dated October 12, 1995, of the Utah Court of Appeals coupled with the entry of a correct opinion suitable for publication in a case of first impression such as the case at bar.

2. An order of the Utah Court of Appeals requiring the Appellee or its agents to forthwith remove the three-foot berm lying outside the stipulated taking leaving only the sod required to cover the raw land on a grade consistent with the original grade existing before construction of the retaining wall.

3. For an order awarding the Appellants the $77,900 value of their entire fee simple, the order to be founded on a taking of property not required except as a cost saving device given the precondemnation existence of sufficient useable right of way before condemnation.

4. For an order awarding the Appellants' appraisal depositions and trial record costs of some $9,000 more or less, the exact amount to be established by affidavit.

5. For Appellants' attorney's fees in line with an amount to be determined by the Utah Court of Appeals.

6. Such other and further relief as may be determined to be just when considered in light of the total record going back to September, 1975, and the letter of Appellee's now deceased employee, ANDREW J. SOPKO.

Dated this 27th day of October, 1995.

J. VAL ROBERTS 02772
Attorney Pro Se and for Defendant/
Appellant Verle H. Roberts

CETERFICATE OF MAILING

I hereby certify that I caused to be mailed in the U. S. Mails, postage prepaid, FOUR (4) true copies of the PETITION FOR REHEARING to the following this 27th day of October, 1995: Stephen C. Ward, Assistant Attorney General, 4120 State Office Building, Salt Lake City, Utah 84114-0811.

J. VAL ROBERTS
Attorney at Law